No. 82-1349

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

UNITED STATES OF AMERICA, *Petitioner*,

v.

EMMA ROSA MASCHER, *et al.*

On Petition For Writ Of *Certiorari* To The
United States Court Of Appeals For The Ninth Circuit

MEMORANDUM FOR EMMA ROSA MASCHER *ET AL* IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

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MEMORANDUM FOR RESPONDENTS EMMA ROSA MASCHER, *ET AL* IN OPPOSITION.

On the morning of July 11, 1973, a Boeing 707-300 aircraft operated by Varig Airlines was cleared to descend from its cruising altitude as it approached the Orly Airport, Paris, France. The aircraft was fully loaded, and after an 11 1/2 hour transatlantic flight from Brazil, and a full breakfast, passengers were moving about the cabin making preparations for the final landing at their destination. As the aircraft descended below 10,000 feet, one of the passengers advised a steward of the sudden appearance of a large volume of white smoke in one of the lavatories. In the next few minutes, the smoke turned from white to black, totally filled the passenger compartment, invaded the flight deck forcing the crew to don oxygen masks, and so obscured their vision that they could not see the instruments located but a few feet in

front of them. In an attempt to remove the smoke and save the passenger's lives, they depressurized the aircraft, but to no avail. Recognizing that all aboard would die unless the aircraft could be landed, they opened the sliding windows on either side of the cockpit in order to see the ground and accomplished a successful forced landing in a farmer's field.

Though the landing was successful, the evacuation was not. All passengers save one and many of the extra crew members required to be on board because of the exceptional length of the flight died while strapped in their seats by reason of inhalation of the hydrogen cyanide, hydrogen flouride and carbon monoxide produced by the burning material in the interior of the aircraft.[1]

The French Government issued a report[2] in which it found that the fire probably started in a trash container under the sink in the lavatory which was probably full of paper after the long trip. The French officials also concluded that the trash containers themselves were probably not in compliance with the U.S. regulations under which the aircraft had been built in that they did not contain the fire.[3]

Suit on behalf of survivors of sixty-two deceased passengers was instituted against the Boeing Company,

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[1] Passenger oxygen masks, unlike those of the crew, are ineffective in the case of smoke and toxic gas, since they do nothing more than mix pure oxygen with ambient cabin air.

[2] Annex 13 of the Treaty of Chicago, 59 Stat. 1945 (indexed at 1701) sets forth the procedures and responsibilities for aircraft accident reporting.

[3] CAR 4b 381(d) states in pertinent part: "All recepticals [sic] for used towels, papers, and waste shall be of fire-resistant material, and shall incorporate covers or other provisions for containing possible fires."

manufacturers of the airplane, and several subcomponent manufacturers in the Supreme Court, New York County. Shortly after the institution of these cases, suit was also started against the United States under the Federal Tort Claims Act in the Central District of California, the only Court in which the Government could be sued by all plaintiffs.[4]

Following limited discovery of several current and retired Federal Aviation Administration (FAA) employees, the District Judge granted a motion for summary judgment brought by the Government on the grounds that there were no genuine issues of material fact and the Government was entitled to judgment as a matter of law. The findings of fact and conclusions of law of the District Judge are reprinted in Appendix B at 8a of Petitioner's brief. The Court of Appeals reversed the District Court on the ground that, under the facts alleged, the California Good Samaritan Rule would permit recovery against one who negligently inspected an aircraft for compliance with a federal regulation, and that neither the misrepresentation exception, 28 USC § 2680(h), nor the discretionary function exception, 28 USC § 2680(a), would apply on the facts of these cases.

In its brief, the Government explains in broad fashion the statutory scheme pursuant to which inspections of aircraft prototypes and production models are made, and observes that "the vast majority of the FAA's inspections are performed by 'designated engineering representatives' " who are *usually* employees of the manufacturer carrying special FAA designation. (Pet. Brief at 5) (em-

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[4] 28 U.S.C. 1402(b) provides that suit against the United States may be instituted in the U.S. District Court where the plaintiffs reside or where the act or ommission occurred.

phasis added) The Government, however, would have done well to explain further that a vast difference exists between the method by which general aviation aircraft are inspected and the method by which commercial air carrier planes (such as the Boeing 707) are inspected.

In the former category, which concededly comprises the "vast majority" of aircraft manufactured in this country, inspections are done mainly by the designated engineering representatives (DER's). In the instant case, however, the record shows that the offending inspection was done by FAA employees, and the lavatory waste receptacle design which they supposedly inspected could not conceivably have met the minimum standards required by the regulations. Examination of a sister ship in Rio de Janeiro, Brazil, after the accident revealed that the trash "container" under the sink in the lavatory was in reality no container at all. Paper towels stuffed into the flapper door at one side of the sink module simply fell down into the area directly below the sink. This volume of space also contained the electric water heaters. Not only was there no container, as such, but the module walls themselves were penetrated in several spots by large round holes, the purpose of which was never established and the presence of which simply assured that any fire developing below the sink would have an adequate supply of oxygen and immediate access to the inside of the aircraft pressure hull.

In fact, even the FAA engineer detailed to investigate the accident stated in a report addressed to his seniors:

> It was also observed in the waste container area of most lavatories that there were numerous holes through the vertical panels between compartments leading to other compartments and in some cases to the aircraft skin. This created an interesting revelation and *it was not clear how the waste containers*

> *could possibly contain fire*, as required by CAR 4b 381(d) and FAR 25.853(d) (1 Nelson Dep. Ex. 26) (emphasis added).

That same engineer drafted a proposed Airworthiness Directive in which he made the determination that "most containers in all jet transportation must be modified to provide simple and obvious containment" (2 Nelson Dep. at 357). In his opinion, the aircraft would not have been certified "if it had not been approved-reviewed" by FAA inspectors (2 Nelson Dep. at 442).

> (FAA) Manufacturing inspectors should be alert for any detail design feature which does not appear to comply with pertinent regulations (1 Nelson Dep. Ex. 34, p. 39, ¶ (b)).

A letter dated March 20, 1967 from Boeing to the Director, Western Region, FAA, states, with respect to inspection of the interior of Boeing 707 aircraft by FAA personnel:

> There were numerous items found during the inspection which were considered unacceptable by Mr. Bulmer *and were modified to his satisfaction prior to delivery of the airplane* (Curtis Dep. 151).

Depositions of that engineer revealed that he knew the reason his position or job existed was to promote air safety (Bulmer Dep. at 89). He further knew that the beneficiaries of his work were the flying public and the operators of the airplanes (*Id.*). He also knew the flying public depended on him to do his job in the interests of air safety (Bulmer Dep. at 90).

The former Chief of the Aircraft Engineering Division of the Western Region of the FAA and present Director, Office of Airworthiness, agreed that two different inspection and certification systems are in effect, one available only to manufacturers of general (light) aviation aircraft

and the other to transport category aircraft (Beard Dep. at 14, 38, 109).

According to the regulations governing the first system, the manufacturer itself accomplishes the inspection and approval as the Petitioner emphasizes in its brief. In the second, employees of the FAA accomplish these functions (Beard Dep. at 14). Such differences are not required by statute (Beard Dep. at 111).

He also testified that an airworthiness certificate signifies to the public and the manufacturer that a particular airplane conforms to an approved design and is in condition for safe flight (Beard Dep. at 48). Likewise, type certificates are given immediate publicity by the manufacturer "because they were so proud they could get the certificate and it helped them in their marketing . . ." (Beard Dep. at 50, 51). A statement is also published in the Federal Register "to advise the world that we have issued a type certificate" (Beard Dep. at 52).

Foreign registered aircraft that have a standard airworthiness certificate issued by their own country can fly in the United States if the country of registry is a signatory to the Chicago (ICAO) Convention, Annex 8 (Beard Dep. at 54).

Various inspections are conducted by the FAA, including compliance inspections, conformity inspections, production system inspections and aircraft inspections (Beard Dep. at 113). The purpose of all inspections is air safety, and the intended beneficiaries are the passengers and the operators of the airplanes (Beard Dep. at 114, 115).

The factual picture which thus emerges is quite different from that which appears from a reading of Petitioner's brief. The substance of it is this: That the Congress gave

the Administrator of the FAA authority to approve aircraft designs, prototypes and production models. The FAA, through regulations, then voluntarily undertook to do so in two different ways; one with respect to private or "general aviation" aircraft and another with respect to aircraft intended for the carriage of passengers for hire. In the latter category much more stringent inspections were made far more often by many more FAA engineers. This fact received wide publicity and many members of the flying public, including some if not all of the passengers aboard the fated flight, relied to some greater or lesser extent on these engineers to do exactly what the FAA said they should do—inspect for compliance with the minimum standards predicated by regulations.

Moreover, in the instant case, a Government engineer either inspected and failed to note the obvious deficiencies which glared out at the accident investigators when they opened the inspection doors under the sink of the lavatory module in the sister ship of the ill-starred Boeing 707 in Rio, or perhaps, *he mandated the changes which caused the accident.*

It is on *these* facts that the Court is asked to grant *certiorari.*

Petitioner attempts to obfuscate the real legal issues involved in this appeal by the wild utilization of scare tactics to convince this Court that, by properly holding that an FAA employee's negligent conduct of his ministerial functions is actionable, the floodgates of litigation will open exposing the Government to potential liability in its "countless health and safety inspections." *United States* v. *United Scottish Insurance Co.*, Petition for certiorari, No. 82-1350 (filed February 11, 1983) at pp. 10-15. The Government lists several federal agencies which inspect and certify various aspects of interstate commerce in an

attempt to manufacture a "parade of horribles" which supposedly will take place if the Circuit's opinion is upheld. By waving this red herring in the face of the Court, however, the Petitioner destroys other arguments in several respects.

First, by listing several agencies which have been assigned some form of inspection and certification activity, the Government acknowledges by implication the level at which policy decisions are made. Each "regulatory agency" is given a broad mandate by Congress and in the agency's top level administrators thereafter make the policy decision of how best to implement that mandate. It is at that level that discretion is invoked within the meaning of *Dalehite* v. *United States*, 346 U.S. 15 (1953). Regulations are issued to detail and delineate the duties and responsibilities that the agency has assumed.

Once implemented however, the agency personnel must properly conduct the attendant duties and responsibilities. Failure to do so gives rise to tort liability.[5]

By listing some of the agencies which have voluntarily elected to define their mandate to include inspections and certifications, the Petitioner impliedly admits that there are others which have elected to conduct business otherwise. In the analagous circumstance of the manufacturer of automobiles, for example, no supervising federal agency requires its employees to make design and production inspections similar to those required by FAA regulations.

The FAA at its highest administrative level has decided as a matter of policy to establish inspection programs. Once each of the regulations implementing that policy were established and defined, as was done with

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[5] *Indian Towing Co.* v. *United States*, 350 U.S. 61 (1955).

CAR 4b.381(d), and the inspection duties were assigned to individual FAA employees, the inspectors were required to perform their function non-negligently. It is important to note again that there is nothing in the Federal Aviation Act of 1958, 49 U.S.C. § 1301 *et seq.*, that requires the FAA to devote personnel to make on-site compliance inspections. The Federal Aviation Act merely states that the FAA must perform its duties "in such a manner as will best tend to reduce or eliminate the possibility, or recurrence of accidents in air transportation. . . ."[6]

As a collateral matter, and in refutation of Petitioner's assertion that recovery should be barred because aircraft inspections are the Government's "quintisentially sovereign function" (such that there is no waiver of tort immunity because, supposedly, there is no parallel liability for private individuals,) it should be noted that the very system voluntarily chosen by the FAA provides for aircraft inspection by private individuals. The duality of the methodology established by the FAA provides for the utilization of private individuals, the DER's employed by the aircraft manufacturer, to ascertain compliance with the standards required by the regulations. While use of DER's is particularly widespread with general aviation aircraft manufacturers, it is also frequently used in the inspection of commercial aircraft, the FAA inspectors being personally involved only at the more critical stages, such as was the case here.

An important distinction must be made between the FAA's inspection and certification responsibilities. Although the FAA must certify civil aircraft for airworthiness pursuant to 49 U.S.C. § 1423, the manner of setting

[6] 49 U.S.C. § 1421.

the criteria and assuring that the design standards have been met are left to the discretion of the agency. The FAA inspectors have a duty to use due care to ensure that the aircraft manufacturer adheres to previously approved regulatory standards and/or to cure all defects before production.[7] If the FAA inspectors fail in this duty, then the tort responsibility is essentially for the negligent inspection although an end result may also be that a defective product is also certified as airworthy when, in fact, it is not.

Reasons Why *Certiorari* Should Not Be Granted

The Ninth Circuit found as a matter of law that the California Good Samaritan Rule, as applied to this case by the Federal Tort Claims Act,[8] would give rise to a cause of action not barred, under the facts alleged, by the discretionary function exception[9] or the misrepresentation exception.[10] It is thus a case the outcome of which will depend upon the proof adduced at trial and applied in accordance with state law on the issue of existence of a duty, and federal law, on the twin issues of discretionary function and misrepresentation.

There can be no question that an actionable duty may rise under the Tort Claims Act by reason of the application of a state Good Samaritan Rule.[11] That leaves only the discretionary function and misrepresentation exceptions.

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[7] *Griffin* v. *United States*, 500 F.2d 1059, 1069 (3d Cir. 1974).

[8] 28 U.S.C. § 2674.

[9] 28 U.S.C.§ 2680(a)

[10] 28 U.S.C.§ 2680(h)

[11] *Indian Towing Co.* v. *United States*, *supra* footnote 5.

On these issues, the Government urges that the Court hold the petition in the instant case pending disposition of its petition in a companion case, *United States* v. *United Scottish Insurance Co.*, No. 82-1350. In its petition in that case, the Government further asks the Court to hold the *United Scottish* petition (and thus this one) pending its decision in *Block* v. *Neal*, 103 Sup. Ct, 1089 (1983).

Respondents Mascher, *et al.*, agree with the Government. *Block* v. *Neal* disposes of the misrepresentation issue, and by implication, also argues forcefully that this is a case to be returned to the District Court for trial on the merits, not one in which "special and important reasons"[12] for *certiorari* exist, or a situation in which lower court has "so far departed from the accepted and usual court of judicial proceedings" as to call into play this Court's power of supervision.[13] Certainly it does not amount to "an important question of federal law which has not but should be decided by this Court.[14] *Certiorari* should be denied.

Respectfully submitted,

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[12] Sup. Ct. R. 17.1

[13] Sup. Ct. R. 17.1(a)

[14] Sup. Ct. R. 17.1(c)